QUESTION PRESENTED

Whether the tribal court of the Three Affiliated Tribes has jurisdiction over a non-Indian's tort claim against another non-Indian arising out of an automobile accident occurring on a state highway located within a permanent federally granted right-of-way within the Fort Berthold Reservation.

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STATEMENT OF THE CASE

This is a personal injury action that was brought in the Tribal Court of the Three Affiliated Tribes ("Tribes") of the Fort Berthold Indian Reservation in North Dakota ("Tribal Court"). The action arises out of a traffic accident that occurred between two non-Indians on a state highway within the exterior boundaries of the Fort Berthold Indian Reservation. The issue is whether the Tribal Court has jurisdiction to hear this matter.

On November 9, 1990, Mr. Lyle Stockert, a non-Indian, was driving a gravel truck owned by A-1 Contractors ("A-1"), a non-Indian owned business with its principal place of business off the Reservation. He was traveling in the northbound lane on North Dakota Highway No. 8, near Twin Buttes, North Dakota, within the exterior boundaries of the Fort Berthold Indian Reservation.[1] At the time Mr. Stockert was traveling north in the northbound lane, Ms. Fredericks was traveling south in the northbound lane. Although Mr. Stockert attempted to avoid a collision, Ms. Fredericks claims she was injured when her vehicle struck the truck. Ms. Fredericks is also non-Indian.[2]

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[1] North Dakota Highway 8 crosses 6.59 miles of land within the reservation before it ends at the shores of Lake Sakakawea. Lake Sakakawea was created by the damming of the Missouri River pursuant to the 1944 Flood Control Act and is under the control of the Army Corps of Engineers. The easement provides that the State of North Dakota has control and responsibility for the realignment, improvement, and maintenance of Highway 8. *See* Appendix A. The highway has always been open to the general public.

[2] A factual dispute was not resolved concerning whether Fredericks resided on the Fort Berthold Reservation at the time

Ms. Fredericks sued Mr. Stockert and A-1 in Tribal Court seeking damages for alleged personal injuries she received in the accident. Ms. Fredericks' adult sons claim damages for loss of consortium. The Complaint requested compensatory damages in excess of $3,032,000.00 and punitive damages in the amount of $10,000,000.00.

Stockert made a special appearance and filed a motion to dismiss the action against him on grounds that the Tribal Court lacked personal jurisdiction over him and jurisdiction over the subject matter of the litigation; A-1 joined in the motion. In response to the motion, the only evidence the Fredericks advanced concerning the relationship between Stockert, A-1, and the Tribes was to proffer a copy of a subcontract agreement between A-1 and LCM, an entity described as a subsidiary of the Tribes. That contract had forum selection and choice of law provisions selecting Utah state courts and Utah law for dispute resolution. The Fredericks tendered no evidence concerning whether Stockert was acting under that subcontract or concerning the impacts of the contract or the accident on the Tribes.

Tribal Court Judge William Strate denied the motion to dismiss. (J.A. at 19-25) Stockert and A-1 appealed the Tribal Court decision to the Northern Plains Intertribal

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of the accident. The original complaint in Tribal Court did not allege that Fredericks resided on the reservation. (J.A. at 5-10). The tribal judge concluded she did, though no facts were presented on the issue. (J.A. at 20-21). The district court found that the question "is irrelevant to the issue of whether the tribe retains jurisdiction over a dispute between two non-Indians." (J.A. at 58)

Court of Appeals and that court affirmed the Tribal Court's determination that the Tribal Court has personal and subject matter jurisdiction to hear this action. (J.A. at 26-37) While there has been no decision on the merits, it is undisputed that respondents have exhausted all available tribal remedies related to the jurisdictional issue presented.

Stockert and A-1 then brought this action in the United States District Court in North Dakota seeking declaratory and injunctive relief against the Tribal judge, the Tribal Court, and the Fredericks. In federal court, Mr. Stockert and A-1 challenged the Tribal Court's assumption of jurisdiction over a tort action between two non-Indians that arose on a state highway within a federally granted right-of-way traversing the reservation.

The parties filed cross-motions for summary judgment on the issue of the jurisdiction of the Tribal Court. The district court granted the motions of the Fredericks and the Tribal parties. A-1 and Stockert appealed from the order (J.A. at 54-65) and judgment (J.A. at 66-67)

A panel of the Eighth Circuit Court of Appeals initially affirmed the district court in a 2-1 decision. (J.A. at 68-90) That decision was vacated and rehearing *en banc* granted at the request of Stockert and A-1. In an 8-4 decision, the *en banc* Court of Appeals reversed the district court, holding that the Tribal Court lacked jurisdiction to hear the matter. (J.A. at 91-138) This Court granted petitioners' request for a writ of certiorari and ordered an expedited briefing schedule.

SUMMARY OF ARGUMENT

1. The Tribal Court does not have jurisdiction over an action between non-Indians that arises out of an automobile accident that occurred on a state highway within a federally granted right-of-way within the exterior boundaries of the Fort Berthold Reservation. The sovereignty retained by Indian tribes in their dependent status does not include the power to exercise civil jurisdiction over actions between nonmembers. Even if civil adjudicatory powers survived incorporation of the Tribes into the United States, the historical record here confirms that any such power has been divested by applicable treaties and agreements. The retained tribal sovereignty of the Tribes does not extend to civil actions over nonmembers. However, even if the Tribes may have such power, it can apply only in the limited situations meeting the test announced in *Montana v. United States*, 450 U.S. 544 (1981).

This Court should adopt the comprehensive and integrated rule outlined by the Court of Appeals that harmonizes existing precedent concerning the scope of civil jurisdiction over non-Indians:

> [A] valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law.

(J.A. at 108). Here, Ms. Fredericks has not established the presence of any valid tribal interest to justify tribal court jurisdiction.

2. Assuming that tribal courts have not been generally divested of civil jurisdiction over non-Indians absent compliance with the *Montana* exceptions, the Tribal Court still lacks jurisdiction in this case since the federal right-of-way, granted by the Secretary of the Interior pursuant to the General Right-of-Way Act of 1948, 25 U.S.C. § 323, divested the Tribes of civil jurisdiction over the activities of nonmembers on the highway. The right-of-way grant and the opening of the highway to the general public divested the tribe of any authority to exclude or regulate the conduct of nonmembers on the state highway.

3. The Tribal Court does not have jurisdiction under either of the *Montana* exceptions. Petitioners have not established that either exception applies. First, respondents entered into no consensual relationships relevant to the accident which would create jurisdiction. They had no direct consensual relationship with Ms. Fredericks. Even if A-1's subcontract with a tribally owned corporation could evidence a consensual relationship by which it could be deemed to have submitted to jurisdiction in an action by Ms. Fredericks, that subcontract evinces just the opposite intent, that disputes be resolved in Utah courts under Utah law. Second, preventing Ms. Fredericks from pursuing the matter in the Tribal Court would have no direct effect on the political integrity, economic security, or health or welfare of the tribe. The state courts of North Dakota are more than adequate to protect any such interests implicated by the tort action between Ms. Fredericks, A-1, and Mr. Stockert.

ARGUMENT

I. THE TRIBAL COURT DOES NOT HAVE, AS PART OF ITS LIMITED SOVEREIGNTY, JURISDICTION OVER A CIVIL ACTION BETWEEN TWO NON-MEMBERS.

This case presents serious issues for non-Indian citizens of western states like North Dakota, who live in or travel across the boundaries of Indian reservations,[3] and potentially for Indians who are not members of the tribe occupying such reservations. If non-Indians or nonmember Indians, for whatever reasons, cross reservation lands on county, state, or federal roads, under petitioners' construction of federal Indian law, they run the risk of being forced into a tribal civil court within a system of justice foreign to them.[4] There, the risk of financial and personal

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[3] The Fort Berthold Indian Reservation contains almost as many nonmembers as member residents. Petitioners' Br. 2-3. Much of it is fee land owned by non-Indians. It is within the State of North Dakota and surrounds Lake Sakakawea, a haven for sailors and fisherman, created by the Garrison Dam on the Missouri River. It is traversed by several state highways.

[4] The Court in *Ex parte Crow Dog*, 109 U.S. 556, 571 (1883), eloquently described how the Indian defendant in that case would feel in a "foreign" court: "It is a case where [the law] . . . is sought to be extended over aliens and strangers; over the members of a community, separated by race, by tradition, by the instincts . . . from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others, and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries

ruin without federally protected constitutional due process or equal protection protections is very real.[5] This Court's decisions leave unresolved whether federal courts may review tribal courts' deprivations of fundamental equal protection and due process rights under the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303 (1988) ("ICRA"). In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), the Court declined to allow federal court review of a tribal policy which allowed children of male members who marry outside the tribe to become members, but denied tribal membership to similarly situated children of female members. In declining to intervene to enforce ICRA due process and equal protection provisions, the majority of the Court held that the ICRA provided federal courts with no original jurisdiction over an ICRA claim. *Santa Clara* involved a fundamental issue of internal tribal self government, tribal rules for membership, and the Martinez's had not exhausted tribal judicial remedies. Nonetheless, *Santa Clara* has been argued to preclude

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them not by their peers, nor by the customs of their people, nor the law of their land, but by . . . a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their . . . nature; one which measures the red man's revenge by the maxims of the white man's morality."

[5] Of course, the Constitution is not applicable to tribes. *See Talton v. Mayes*, 163 U.S. 376 (1896). And, even though the Indian Civil Rights Act, 25 U.S.C. § 1302(8) (1988), includes due process and equal protection language, those clauses do not necessarily provide protection equivalent to the Constitution. *See Randall v. Yakima Nation Tribal Court*, 841 F.2d 897, 900 (9th Cir. 1988).

federal court review of deprivations of non-Indians' civil rights in civil suits in tribal courts. Petitioners' Br. 14 n.7.

Nonmember citizens might be placed in the undesirable situation, contrary to long-standing federal policy of encouraging intercourse with tribes, where the only safe course is to avoid interaction with their Native American friends, neighbors, and interests on the reservation. For others, including states and railroads, it could mean rebuilding the infrastructure so that state and federal highways and other roads would allow travelers to bypass reservation lands in order to remain secure in their person and property.

However, a North Dakota state court, the State in which both Ms. Fredericks and Mr. Stockert are citizens, stands open to them for fair redress of grievances just a few miles from the scene of the accident. Ms. Fredericks preferred initially to bring this action in a court which has only been in the business of attempting to dispense Anglo-American jurisprudence for slightly over two decades, and would apply customs or traditions foreign at least to Mr. Stockert and A-1.[6] Tribal judges often are not trained in law and serve at the whim of the tribal

[6] Ms. Fredericks has recently commenced a parallel action in North Dakota District Court, Southwestern Division, County of Dunn, Civil No. 96 C 41. A-1 and Stockert have answered that state court complaint and are prepared to proceed in that forum. Interestingly, the courthouse for Dunn County, in Manning, North Dakota, is physically much closer by road to the accident scene near Twin Buttes than the tribal courthouse in Mandaree, North Dakota.

council, without any effective separation of powers to compensate for frequent political turmoil.[7]

Certainly sovereign power of this magnitude over nonmembers is not consistent with the status of tribes as *limited* sovereigns and has never been delegated by Congress. This Court has never allowed unbridled tribal court jurisdiction in a civil matter involving two nonmembers. Tribal jurisdiction over non-Indians has been limited to situations where a tribal interest is directly affected. *See Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); *Montana v. United States*, 450 U.S. 544 (1981); *South Dakota v. Bourland*, 508 U.S. 679 (1993).

A. Federal courts are the final arbiters of the extent of tribal court jurisdiction.

The jurisdiction of a Tribal Court depends upon the retained sovereignty of the Tribe. Because the jurisdiction of tribal courts is limited by federal law and federal courts' interpretation of tribes' retained sovereignty, the question of the scope of tribal court jurisdiction is a

[7] Tribal constitutions and law and order codes governing courts across the country provide for review of tribal court decisions by elected tribal officials. *See, e.g., New Mexico Indian Tribal Court Handbook* (State Bar of New Mexico 1993 ed.) (Pueblo de Acoma and Santa Clara Pueblo – appeals from tribal court to Pueblo Council, the elected governing body of the Pueblo; Pueblo of San Juan – appeals to elected Pueblo Governor). Moreover, many tribal courts limit jury service to tribal members, notwithstanding that nonmembers and non-Indians may reside on the reservation. *See, e.g.*, Ch. 2 Section 8(c) of the Tribal Code of the Three Affiliated Tribes.

federal one. *See National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 852-53 (1985).[8] As a matter of law, the Tribal Court of the Three Affiliated Tribes lacks subject matter jurisdiction to hear the Fredericks' claims because the Tribes' retained sovereignty is limited to matters involving tribal members or a vital tribal interest as outlined in *Montana v. United States*, 450 U.S. 544 (1981). This Court should affirm the decision of the U.S. Court of Appeals of the Eighth Circuit.

B. This Court's jurisprudence demonstrates that the sovereignty retained by Indian tribes in their dependent status does not include the power to exercise civil jurisdiction over actions between nonmembers.

Petitioners and the United States' arguments premised upon language in *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S 9, 18 (1987), that tribes "presumptively" have civil jurisdiction over non-Indians, overlook the starting point this Court has prescribed for determining the jurisdiction of tribal courts. In *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845 (1985), this Court held that:

> the existence and extent of a tribal court's jurisdiction will require a careful examination of

[8] As noted, Mr. Stockert and A-1 have fulfilled the exhaustion requirement announced in *National Farmers Union*, which was extended in *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), to require referral in diversity cases.

> tribal sovereignty, the extent to which that sovereignty has been altered, divested, or diminished, as well as a detailed study of relevant statutes, Executive Branch policy as embodied in treaties and elsewhere, and administrative or judicial decisions.

National Farmers, 471 U.S. at 855-56 (footnote omitted). Advancing broad principles divorced from their factual moorings, neither petitioners nor their *amici* make the "careful examination" this Court requires. The discussion that follows will demonstrate (1) that tribal sovereignty does not extend to civil adjudicatory jurisdiction over nonmembers; *see* Point I.B.(1), *infra*; (2) that the required detailed study of statutes, treaties, and executive orders applicable to the Fort Berthold Reservation reflects that the Tribes relinquished or were divested of any inherent authority that survived their incorporation into the United States, *see* Point I.B.(2), *infra*; and (3) that *Montana v. United States*, 450 U.S. 544 (1981), and other judicial decisions teach that tribal civil adjudicatory jurisdiction over an action between non-Indians is unsupportable on the record in this case, *see* Point I.B.(3), *infra*.

1. Tribal sovereignty does not extend to civil adjudicatory jurisdiction over nonmembers.

This Court has drawn sharp distinctions between a tribal court's jurisdiction over members and

nonmembers.[9] In *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 213 (1978), the Court held that a tribal court could not exercise criminal jurisdiction over a non-Indian for criminal acts committed on Indian territory. Indian tribes do not retain powers that are "inconsistent with their status as domestic dependent nations." *Id.; see also United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.").

Contrary to petitioners' contentions that an express statutory divestiture of a tribal power is required, *Oliphant* held that *"[u]pon incorporation into the territory of the United States*, the Indian tribes thereby come under the territorial sovereignty of the United States and their exercise of separate power is constrained so as not to conflict with the interests of this overriding sovereignty." *Oliphant*, 435 U.S. at 209. The Court addressed criminal jurisdiction in terms that inform the present question:

> [F]rom the formation of the Union and the adoption of the Bill of Rights, the United States has manifested . . . [a] great solicitude that its citizens be protected by the United States from

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[9] As the Court explained in *Ex Parte Crow Dog*, 109 U.S. 556, 568 (1883)

> " . . . it was the very purpose . . . to introduce and naturalize among them . . . self-government, the regulation by themselves of *their own domestic affairs*, the maintenance of order and peace *among their own members* by the administration of their own laws and customs."

Id. at 568 (emphasis added).

> unwarranted intrusions on their personal liberty. The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty. By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.

Oliphant, 435 U.S. at 210.

Hence, divestiture of adjudicatory powers has occurred implicitly by "incorporation into the territory of the United States." By specific treaty provision or by statute, Congress has taken away other attributes of sovereignty. The remaining authority has been described as *"inherent powers of a limited sovereignty which has never been extinguished." Wheeler*, 435 U.S. at 323, *quoting* F. Cohen, *Handbook of Federal Indian Law*, 122 (1942) (emphasis in original). The historical record, discussed below, supports that the Tribes were divested implicitly of civil adjudicatory power over non-Indians. *See* Point I.B(2), *infra*.

Central among the elements of sovereignty lost by incorporation into the territory of the United States was sovereignty "involving the relations between an Indian tribe and nonmembers of the Tribe." *Wheeler*, 435 U.S. at 326; *accord*, *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 425-26 (1989). This Court recognized early on the scope of this divestiture in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 145 (1810), that "[a]ll the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty

amounts to the right of governing every person within their limits except themselves." In *Duro v. Reina*, 495 U.S. 676 (1990), the Court relied upon *Wheeler* and *Oliphant* to conclude that a tribal court does not have jurisdiction over a nonmember Indian. This Court's cases compel "the conclusion that Indian tribes lack jurisdiction over persons who are not tribe members." *Id.* at 685. Tribes cannot expand their jurisdiction to matters inconsistent with their dependent status by enacting broad jurisdictional code provisions.[10]

2. The historical record reveals that the Three Affiliated Tribes implicitly have been divested of the power to adjudicate civil claims against non-Indians.

The "detailed study" *National Farmers Union* requires of the relevant historical record begins with treaties and agreements reached between the Three Affiliated Tribes and the United States in 1825, 1851, and 1866. In 1825, the Arikara, Mandan, and Minnetaree (Gros Ventre) Tribes, now the Three Affiliated Tribes, signed separate, yet virtually identical treaties with the United States. *See* Treaty

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[10] The subject matter jurisdiction provision of the Tribal Code of the Three Affiliated Tribes attempts to assume more power than the Tribes' dependent status permits. Subsection 3.5 states:

> The Court shall have jurisdiction over all civil causes of action arising within the exterior boundaries of the Reservation, and over all criminal offenses which are enumerated in this Code, and which are committed within the exterior boundaries of the Reservation.

(J.A. at 34).

of July 18, 1825 with the Arikara Tribe, 7 Stat. 259; Treaty of July 30, 1825 with the Mandan Tribe, 7 Stat. 264; and Treaty of July 30, 1825 with the Minnetaree (Gros Ventre) Tribe, 7 Stat. 261 (collectively "the 1825 Treaties"). Those Treaties do not confer civil jurisdiction over non-Indians on the signatory Tribes, nor do they provide the Tribes with the power to exclude non-Indians from their lands. On the contrary, the 1825 Treaties confirm to the United States the power to allow nonmembers to pass through the Reservation. *See, e.g.*, Treaty of July 18, 1825, Article 5 (Tribe agrees "to give safe conduct to all persons . . . authorized by the United States to pass through their country. . . . ").

Importantly, the 1825 Treaties also provide repeatedly for a non-tribal forum or agency to resolve any disputes that may arise between members of the Tribes and non-Indians or nonmember Indians. In the 1825 Treaties, the signatory Tribes disclaim "private revenge or retaliation" for "injuries done" to members of the Tribes by non-Indians. Rather, the Tribes agreed that "complaints [for those injuries] shall be made, by the party injured, to the Superintendent or Agent of Indian Affairs or other person appointed by the President." *See* Treaty of July 18, 1825, Article VI. Under the 1825 Treaties' provisions, the United States agreed that the wrongdoer then was to be punished "agreeably to the laws of the United States."[11] It also agreed to provide full "indemnification" for any horses or other property stolen by a citizen of the United States from a member of the Tribes. Thus, the 1825

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[11] The United States also agreed in the 1825 Treaties that it would prosecute crimes perpetrated on tribal members "as if the injury had been done to a white man." *Id.*

Treaties provided for federal, not tribal, remedies for injuries to Indians by alleged non-Indian wrongdoers.

The Tribes were also signatories to the Fort Laramie Treaty of September 17, 1851, 11 Stat. 749. Article II of that Treaty grants the United States "the right . . . to establish roads" within the territories of the tribes party to the agreement. *Id.* Further, Article III of the Treaty provides that the "United States bind themselves to protect [the signatory tribes] against the commission of all depredations by the people of the United States. . . . " *Id.*

The Fort Berthold Agreement of July 27, 1866 entered into between the Arikara, Gros Ventre, and Mandan Tribes and the United States,[12] provides further confirmation that resolution of disputes between members and non-Indians was to be federal, and not tribal. Under the 1866 Agreement, the Three Affiliated Tribes reaffirmed their commitments in the 1825 Treaties to federal resolution of disputes with non-Indians, agreeing to "deliver to the proper officer or officers of the United States, all offenders against the treaties, laws, or regulations of the United States . . . ". The 1866 Agreement further contemplates federal, rather than tribal, resolution of disputes between the Tribes or their members and nonmember Indians and that "the same rule shall prevail with regard

[12] Although the 1866 Agreement apparently was unratified, *see* II C. Kappler, *Indian Affairs Laws & Treaties* at 1052-1055 (1904 ed.), Congress made appropriations in accordance with its provisions, *see* I C. Kappler, *Indian Affairs Laws & Treaties* at 882 (1904 ed.).

to compensation and punishment as in cases of depredations against citizens of the United States." 1866 Agreement, Article V. Given these provisions, it cannot have been contemplated that non-Indians would be subject to tribal court jurisdiction.

The 1866 Agreement's contemplation of federal primacy over claims against non-Indians traversing the Reservation is reflected in the 1866 Annual Report of the Commissioner of Indian Affairs:

> . . . the commission effected a treaty at Fort Berthold . . . by which . . . a right-of-way [was obtained] . . .
>
> The great amount of travel through the country occupied by these Indians . . . by persons en route to and from the gold regions of Montana, interfering greatly with the game upon which the Indians depend, has made it imperatively necessary that those routes should be made secure to travelers; and, at the same time, justice to the Indians required a liberal compensation for the damages necessarily resulting from this invasion of their hunting ranges.

1866 Report, 14.[13] The 1866 Agreement reinforces the understandings reflected in the 1825 Treaties that the United States would take responsibility for administering compensation for the Tribes and their members for damages arising from non-Indians traversing the lands of the Three Affiliated Tribes.

[13] Annual Reports of the Commissioner of Indian Affairs are located at the National Archives, Records of the Department of the Interior, Record Group No. 287.

The 1825 Treaties, the 1851 Treaty, and the 1866 Agreement, however, did not provide a reservation for the Three Affiliated Tribes. Subsequently, the Fort Berthold Reservation was created by Executive Order dated April 12, 1870. It was then diminished by authority of Acts of Congress dated March 3, 1891, February 18, 1907, June 1, 1910, August 3, 1914, and March 3, 1917, which were effectuated by Executive Orders dated July 13, 1880, which restored certain lands to the public domain, and June 29, 1911, September 17, 1915, and April 7, 1917, which opened unallotted agricultural lands on the Fort Berthold Reservation to settlement and entry under the homestead laws.[14] As a consequence of these statutes and orders, almost half of the residents of the reservation now are non-Indians. *See* Petitioners' Br. 2-3.

This historical record mandates the conclusion that non-consenting non-Indians would not be subject to tribal court jurisdiction. The Three Affiliated Tribes recognized they would not adjudicate claims against non-Indians by treaty, agreement, and long non-use of the now asserted power.[15] Non-Indian settlers on opened

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[14] *See* Acts of Congress dated March 3, 1891, 26 Stat. 1032; February 18, 1907, 34 Stat. 894; June 1, 1910, Pub. L. No. 197, ch. 264, 36 Stat. 455; August 3, 1914, 38 Stat. 681; March 3, 1917, 39 Stat. 1131; Executive Order dated April 12, 1870 (Grant), I C. Kappler, *Indian Affairs Laws & Treaties* at 883, *reprinted in Executive Orders Relating to Indians Reservations* at 133 (G.P.O. 1912); Proclamation, June 28, 1911, 37 Stat. 1693 (Taft); Proclamation, September 17, 1915, 79 Stat. 1748 (Wilson); Proclamation, April 7, 1917, 40 Stat. 1655 (Wilson).

[15] The Three Affiliated Tribes did not assert civil jurisdiction over non-consenting, non-Indians until the 1980's. *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold*

lands on the Reservation doubtless relied on that understanding.

The treaty provisions requiring claims by tribal members arising from injuries or damages caused by non-Indians to be submitted to federal officials are consistent with the "established principle of international law that a nation is responsible for wrongs done by its citizens to the citizens of a friendly power. . . . This responsibility of a nation for the acts of its individual members is so well established and regulated by international law that it falls little short of being a natural right." *Brown v. United States*, 32 Ct.Cl. 432 (1897). As the Court of Claims recognized in *Brown*, "the United States has always held an Indian tribe in amity to a like responsibility." *Id.*

The continued validity of treaty provisions comparable to those present here was acknowledged by the Court of Appeals for the Federal Circuit in *Tsosie v. United States*, 825 F.2d 393 (Fed. Cir. 1987). In *Tsosie*, an action filed after a Navajo tribal member's administrative claim had been denied within the Department of the Interior, the Court of Appeals found that an administrative remedy provision of the Navajo Treaty of June 1, 1868 provided the basis for an action in federal district court by an individual tribal member against the United States following the exhaustion of the applicable administrative remedy. 825 F.2d at 403. The court described the remedy provision as being "one between two nations" under which "each one promised redress for wrongs committed

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Engineering, Inc., 476 U.S. 877, 889 (1986). That recent assertion cannot overcome agreements made more than 100 years ago, and honored by all since made.

by its nationals against those of the other nation." *Id.* at 400 n.2. The Treaty language indicates that the signatory tribe would not have civil jurisdiction over non-Indians for claims for damages for "wrongs committed against the person or property of the Indians. . . . " *Id.* at 400.

The contemplation that tribes will not resolve disputes involving non-consenting non-Indians also is reflected in historic, contemporaneous understandings regarding tribal courts' powers. Such pronouncements evidence the "common notions of the day" surrounding the 1825 Treaties and the 1866 Agreement that *Oliphant* instructs are material to determining the scope of retained tribal powers. *See Oliphant*, 435 U.S. at 206.[16] As confirmed in the *amicus* briefs supporting petitioners, tribal courts' efforts to exercise civil adjudicatory jurisdiction over non-Indians are a relatively recent phenomenon. "Until the middle of this century, few Indian tribes maintained any semblance of a formal court system." *Oliphant*, 435 U.S. at 197.

Even where tribal court systems existed, nineteenth century Congressional acts, treaties and Executive Branch materials, and judicial decisions consistently reflected the widely held understanding that Indian Tribes did not have civil jurisdiction over non-resident, non-Indians. *See, e.g.*, Act of May 2, 1890, 26 Stat. 81, 194 ("the judicial tribunals of the Indian nations" shall retain jurisdiction in

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[16] In *Oliphant*, the Court stated: "These instruments, which beyond their actual text form the backdrop for the intricate web of judicially made Indian law, cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." 435 U.S. at 206.

cases in which tribal members shall be the only parties; federal courts have jurisdiction over actions in which a non-Indian was a party); Treaty between United States and Cherokee Nation, July 19, 1866 (14 Stat. 799) ("the United States District Court, the nearest to the Cherokee Nation, shall have exclusive original jurisdiction of all causes, civil and criminal," where one party is a non-Indian, non-resident); *Raymond v. Raymond*, 83 F. 721, 722 (8th Cir. (Indian Territory) 1897) (Cherokee courts were effective only as to the "rights of the persons and property of members of the Cherokee Nation as against each other"); *see also* Regulations of the Indian Department, 88-90 (G.P.O. 1884) (Ninth Rule governing Courts of Indian Offenses provides jurisdiction over "civil suits where Indians are parties thereto").

In *Oliphant*, this Court addressed other contemporaneous understandings relevant here: the Court discussed *In re Mayfield*, 141 U.S. 107 (1891), at length to demonstrate that Congress' historic actions reflected "an intent to reserve jurisdiction over non-Indians for the federal courts." *Oliphant*, 435 U.S. at 204. While the Court addressed *Mayfield* with an eye toward the criminal jurisdictional question presented, the principles espoused in *Mayfield*, as reaffirmed in *Oliphant*, are equally applicable in the civil context.

In *Mayfield*, the Court discussed treaty and statutory provisions reflecting that federal, not tribal, courts would have jurisdiction in all civil and criminal cases unless the only parties to a case are tribal members by nativity or adoption. *See* 141 U.S. at 114-16, *quoting* Treaty with Cherokee Nation of July 19, 1866, 14 Stat. 799; and Act of May 2, 1890, 26 Stat. 81. Thus, when the Court in *Mayfield*

stated that "the general object of these statutes is . . . to reserve to the courts of the United States jurisdiction of all actions to which [non-tribal members] are parties on either side," the Court clearly referred to both civil and criminal matters. *See* 141 U.S. at 116, *quoted* in *Oliphant*, 435 U.S. at 204.[17] Therefore, while *Oliphant* presented the question of criminal jurisdiction over non-Indians, the analysis which led to the result there applies forcefully in the civil context. *See also Montana*, 450 U.S. at 565 (the Court concluded that the same understandings underlying *Oliphant* "support the general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe.").

The historical record demonstrates that the Three Affiliated Tribes have been divested of any civil adjudicatory authority over non-members, plainly including those operating motor vehicles on state highways located on federally-granted rights-of-way. The backdrop of contemporaneous understandings confirms that the 1825 Treaties and the 1866 Agreement divested the Tribal Court of any subject matter jurisdiction it may have over this action. Consequently, this Court should acknowledge that the

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[17] Contrary to the suggestions of *amici* Yavapai-Apache Nation et al., 13, the 1855 Opinion of Attorney General Cushing, which the Court cited in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 199 (1978), and quoted in *National Farmers*, 471 U.S. 845, 854-55 (1985), concluded only that the Choctaw Nation could exercise civil jurisdiction over a non-Indian who had, of his own free will, chosen to become a member of the tribe. *See* 7 Op. Atty. Gen. 175 (1855). That opinion is entirely consistent with the notion that tribes lack jurisdiction over non-consenting non-Indians.

1825 Treaties and 1866 Agreement provisions, reflecting consistent international law principles, divested the Three Affiliated Tribes of adjudicatory jurisdiction over nonmembers of those tribes.

The recent federal statutes and legislative history material discussed at length in the United States' Brief *amicus curiae* fails to reflect restoration of this historical divestiture of adjudicatory authority. *See* United States Br. 2-5. The statutes cited do not delegate to tribes civil adjudicatory jurisdiction over nonmembers. In the absence of a congressional authorization, the references are of no moment. *See Montana*, 450 U.S. at 564. In addition, the United States' quotation from the Indian Tribal Justice Act, 25 U.S.C. § 3611, reflects only legislative history of the Congress' understanding of certain aspects of federal Indian law as developed by this Court, rather than some affirmative statement of federal policy. *See, e.g.*, United States Br. 4, S. Rep. No. 88, 103d Cong., 1st Sess. 8 (1993) ("Finding (5) was added to reflect the decision . . . of *Montana* . . . ").[18] These developments cannot serve to overcome the clear record that the Three Affiliated Tribes have been divested of any civil tribal court jurisdiction over nonmembers.

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[18] Further, Senator McCain of Arizona, Chair of the Senate Committee on Indian Affairs, commented in graphic terms that an earlier, comparable version of the Indian Tribal Justice Act was not intended to address the scope of tribal court jurisdiction because "there's going to be a lot of blood on the floor before we get the issue of jurisdiction resolved." Senate Hrgs. No. 291, 102d Cong., 1st Sess. 25 (1992).

3. *Montana* governs assertions of retained tribal sovereignty over non-Indians in civil cases.

This Court's decision in *Montana v. United States*, 450 U.S. 544 (1981), is the lodestar by which any assertion of retained tribal sovereignty in civil matters must be judged. In *Montana*, the Crow Tribe sought to prohibit hunting and fishing within its reservation by anyone not a member of the tribe. The United States Supreme Court held that the Crow Tribe's inherent sovereignty did not support the Tribe's prohibition of hunting and fishing on fee lands owned by non-Indians. The Court recognized the general principle that the *"exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation."* 450 U.S. at 564 (emphasis added). Because regulation of the non-Indian hunting and fishing on fee land owned by nonmembers of the tribe did not bear any "clear relationship to tribal self-government or internal relations," this general principle precluded extension of tribal jurisdiction to the non-Indian activities at issue. *Id.*

The Court in *Montana* highlighted what it made clear in *Wheeler*: regulation of "the *relations between an Indian tribe and nonmembers of the tribe*" is necessarily inconsistent with the tribe's dependent status, and therefore tribal sovereignty over such matters of *"external relations"* is divested. 450 U.S. at 565; *quoting Wheeler*, 435 U.S. at 326 (emphasis in *Montana*). It is this language that the Court relied upon in *Montana* to "distinguish between those inherent powers retained by the tribes and those

divested." *Montana*, 450 U.S. at 564. The Court in *Montana* reasoned:

> [T]hrough their original incorporation into the United States as well as through specific treaties and statutes, the Indian tribes have lost many attributes of sovereignty. . . .
>
> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and non-members of the tribe*. . . .
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*. But the powers of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such powers as would necessarily be lost by virtue of a tribe's dependent status." *Ibid.*

Montana, 450 U.S. at 563-64 (emphasis in original) (*quoting Wheeler*, 435 U.S. at 326).

The Court in *Montana* noted two "exceptions" to the general principle of limited tribal civil jurisdiction:

> [There are two circumstances in which] Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. [1] A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases,

> or other arrangements. [2] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

Montana v. United States, 450 U.S. at 565-66 (citations omitted).[19]

Thus, these two narrowly circumscribed exceptions to the implicit divestiture of the power of tribes to control the activities of nonmembers are the only possible remaining bases upon which the Three Affiliated Tribes may assert civil jurisdiction over the non-Indians in this case. Given that *Montana* establishes a presumption that tribal civil power over non-Indians does not exist, and can only be supported by establishing one of the two *Montana* exceptions, the proponent of tribal civil jurisdiction must demonstrate that a *Montana* exception applies.

As the Eighth Circuit noted below, this Court has reaffirmed and broadened the sweep of the *Montana* analysis of civil jurisdiction over non-Indians. (J.A. at 99-100) (*citing South Dakota v. Bourland*, [508 U.S. 679, 693] 113 S. Ct. 2309, 2319 (1993); *County of Yakima v. Confederated*

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[19] The Court embraced *Montana* in *Duro v. Reina*, 495 U.S. 676, 688 (1990), which states that:

> As distinct from criminal prosecution, this civil authority typically involves situations arising from property ownership within the reservation or "consensual relationships" with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.

Tribes and Bands of Yakima Indian Nation, 502 U.S. 251, 267 (1992); *Duro*, 495 U.S. at 687-88, *overruled by statute on other grounds*, 25 U.S.C. § 1301(2)&(3); *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408, 426-27 (1989) (plurality)). Petitioners advance no sound reasons for carving adjudicatory jurisdiction from the broad scope of the *Montana* rule. Consequently, the *en banc* Eighth Circuit correctly concluded that *Montana* governed its determination.

a. *Iowa Mutual* does not remove civil adjudicatory jurisdiction from the *Montana* rule.

In the face of this clear limitation of tribal civil jurisdiction over nonmembers absent express congressional delegation, the petitioners assert that *Montana* conflicts with *dictum* which they mischaracterize as the "*Iowa Mutual* rule".[20] *See* Petitioners' Br. 15; *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987). *Iowa Mutual* expressed no such "rule." Rather, it addressed only which court should first decide whether the tribal court had jurisdiction. It arose when an Indian, a worker on an Indian-owned ranch on the Blackfeet Reservation in Montana, was injured when he jackknifed a truck. He sued the ranch for personal injuries he sustained in the truck accident and joined its insurer for bad faith refusal to settle. The tribal court held it had subject matter jurisdiction. The insurer did not appeal to the tribal court of appeals,

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[20] Although petitioners' attempt to portray some isolated language from *Iowa Mutual* as a "rule", their erroneous characterization does not make it so.

but instead sought a declaration of no coverage under its policy in federal district court under diversity jurisdiction.

The issue as framed by this Court was "whether a federal court may exercise diversity jurisdiction before the tribal court system has an opportunity to determine its own jurisdiction." *Iowa Mutual*, 480 U.S. at 11. The Court extended *National Farmers Union*'s exhaustion requirement for federal question jurisdiction cases to those based on diversity jurisdiction as well, because principles of comity require federal courts to stay their hands until tribal court remedies have been exhausted. The Court noted that the Blackfeet Tribal Court's determination of tribal jurisdiction remained ultimately subject to federal review.

The only specific holding or "rule" in *Iowa Mutual* is that principles of comity require exhaustion of tribal remedies before a federal district court can decide the issue of federal court jurisdiction. *Iowa Mutual*, 480 U.S. at 18-19; *see also Brendale*, 492 U.S. at 427 n.10 (White, J., plurality) (*Iowa Mutual* only established an exhaustion rule and did not determine whether the tribe had jurisdiction over nonmembers). In addressing the exhaustion question, the Court made the following observation:

> Tribal authority over the activities of non-Indians on reservation lands is an important part of tribal sovereignty. *See Montana v. United States*, 450 U.S. 544, 565-66 (1981) [other citations omitted]. Civil jurisdiction over such activities presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.

Iowa Mutual, 480 U.S. at 18.

The petitioners put too much emphasis upon the second sentence, and ignore the first sentence and the citation to *Montana*. As a consequence, petitioners and their *amici* effectively seek to nullify *Montana*.[21]

First, *Iowa Mutual* was simply an exhaustion case. It did not decide the broader question of tribal court civil jurisdiction over non-consenting nonmembers. *See Brendale*, 492 U.S. at 427 n.10. As such, petitioners' assertion that there exists an "*Iowa Mutual* rule" of presumptive tribal civil jurisdiction absent express congressional divestment is wrong. The *Iowa Mutual* case did not create such a rule either expressly or impliedly. As such, there is no conflict with *Montana* as petitioners assert.

More importantly, as the *en banc* decision below correctly concludes, the language in *Iowa Mutual*, upon which petitioners rely, "can and should be read more narrowly and in harmony with the principles set forth in *Montana*, which the Court cites in making those observations." (J.A. at 101).

In explaining how *Iowa Mutual* should be read in harmony with *Montana* the Court of Appeals noted:

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[21] Of course, as discussed *supra* at Point I.B.(2) and (3), *supra*, even if petitioners were correct, the applicable treaty provisions and grant of right-of-way serve to divest the Tribes of jurisdiction over actions involving nonmembers or non-Indians.

When the Court observes in *Iowa Mutual* that "[t]ribal authority over the *activities* of non-Indians on reservation lands is an important part of tribal sovereignty," 480 U.S. at 18, the Court cites *Montana* and thus is referring to the types of activities, like consensual contractual relationships (the first *Montana* exception), that give rise to tribal authority over non-Indians under *Montana*. Likewise, when the Court goes on to say "[c]ivil jurisdiction over *such activities* presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute," *id.* (emphasis added), the Court again is referring to a tribe's civil jurisdiction over tribal-based activities that exists under *Montana*. . . . Hence, *Iowa Mutual* should not be read to expand the category of activities which *Montana* described as giving rise to tribal jurisdiction over non-Indians or nonmembers. Instead, we read it within the parameters of *Montana*.

(J.A. at 102).

Iowa Mutual can and should be read only within the parameters of its recognition of the limitations on tribal civil jurisdiction over nonmembers outlined so clearly in *Montana*. As the Eighth Circuit *en banc* decision noted, a careful reading of the *Montana* and *Iowa Mutual* cases indicates that they can and should be read together to establish one comprehensive and integrated rule:

> [A] valid tribal interest must be at issue before a tribal court may exercise civil jurisdiction over a non-Indian or nonmember, but once the tribal interest is established, a presumption arises that tribal courts have jurisdiction over the non-Indian or nonmember unless that jurisdiction is affirmatively limited by federal law.

(J.A. at 108).

Finally, contrary to petitioners' assertions, *Williams v. Lee*, 358 U.S. 217 (1959), does not support nonconsensual tort jurisdiction over a non-Indian defendant. In *Williams*, a non-Indian trader had a store on the Navajo Reservation. He sold goods on credit to members of the Tribe. Consistent with *Montana's* later announced first exception, the trader had a consensual relationship with the *tribal members* he sought to collect from on transactions he made *with them* on the reservation. Therefore, he could not force the *tribal members* into a *state court* off the reservation to collect the debts arising from those on-reservation transactions. *Williams v. Lee* does not support an extension of tribal powers to require off-reservation nonmembers to defend a tribal court action filed by members with whom they have no consensual relationship.

b. *Montana* applies to both tribal regulatory and adjudicatory jurisdiction.

The petitioners attempt to limit *Montana* and its progeny to cases involving only regulatory power, and not adjudicatory power is unsound. In fact, as the Eighth Circuit noted below, "those cases have spoken about civil jurisdiction in broad and unqualified terms without any limitation of the discussion to particular aspects of civil jurisdiction." (J.A. at 107). Moreover, in *Iowa Mutual*, the Court cites *Montana* without any indication that *Montana* should be limited to factual situations regarding regulatory jurisdiction. *See Iowa Mutual*, 480 U.S. at 18. The *en*

banc opinion aptly indicates that petitioners' attempt to apply such a distinction is, in this case, illusory since if the tribal court tried this suit it would essentially be acting in both an adjudicatory and regulatory capacity. (J.A. at 107). *See also Red Fox v. Hettich*, 494 N.W.2d 638 (S.D. 1993).

c. *Montana* applies to all lands where a tribe has been divested of any power to exclude or control.

While both *Montana* and *Brendale* involve questions of tribal authority over non-Indians on non-Indian owned fee lands, neither case limits its discussion, rationale or holding to issues arising on fee lands. Instead, *Montana* specifically found, without qualification, that *tribal power* itself is limited to what is necessary to protect tribal self government and to control internal relations, absent express congressional delegation of more expansive authority. *Montana*, 450 U.S. at 564. Furthermore, *Montana* specifically addressed the "forms of civil jurisdiction over non-Indians on their reservations" and outlined the two limited situations in which that jurisdiction may apply. *Id.* at 565. The Court did not limit its rationale to cases arising on non-Indian fee lands but referred broadly to tribal power over nonmembers.

Moreover, as the Court of Appeals aptly notes in its *en banc* decision "a number of cases analyzing civil jurisdictional issues in non-fee land disputes have relied upon or cited *Montana*." (J.A. at 106) (citing *Stock West Corp. v. Taylor*, 964 F.2d 912, 918-19 (9th Cir. 1992) (en banc); *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990); *Tamiami Partners Ltd. v. Miccosukee Tribe of Indians of*

Florida, 999 F.2d 503, 508 n.11 (11th Cir. 1993). The *en banc* decision correctly concluded that "any attempt to limit the rationale of *Montana* and *Brendale* to fee land jurisdictional issues is both uncompelling and unsupported by the language of those two cases." (J.A. at 106).

d. The *Montana* analysis applies to the federally granted rights-of-way for Highway 8.

The accident underlying this case occurred on North Dakota Highway 8 within a grant of easement for right-of-way dated May 8, 1970, issued by the Secretary of the Interior pursuant to the General Right-of-Way Act of 1948, 25 U.S.C. §§ 323-28 (1988), and its implementing regulations.[22] The only specific rights reserved to the Indian landowners were outlined in the easement:

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[22] In 1948, Congress enacted a comprehensive, general purpose right of way statute, 62 Stat. 17, 25 U.S.C. §§ 323-328 (1988), which delegates to the Secretary, not to tribes, the right to grant rights-of-way for all purposes over and across tribal trust lands. *See Fredericks v. Mandel*, 650 F.2d 144, 147 (8th Cir. 1981) (the Fort Berthold Reservation tribal court had no jurisdiction to grant a right of way or easement over trust lands with the Fort Berthold Reservation). While 25 U.S.C. § 324 requires consent of the tribe, the right-of-way grantor is the United States. 25 U.S.C. § 325 and 25 C.F.R. § 161.12 prohibit the grant of rights-of way without the payment of just compensation. *Loring v. United States*, 610 F.2d 649, 650 (9th Cir. 1979). These consent and compensation provisions are triggered because the tribe's right of occupancy is to be extinguished. *See generally Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974).

> "the right is reserved to the Indian landowners, their lessees, successors, and assigns to construct crossings of the right-of-way at all points reasonably necessary to the undisturbed use and occupany[sic] of the premises affected by the right-of-way; such crossing to be constructed and maintained by the owners or lawful occupants and users of said lands at their own risk and said occupants and users to assume full responsibility for avoiding, or repairing any damage to the right-of-way which may be occasioned by such crossing."

The Tribes reserved no other right to exercise any dominion or control over the right-of-way in consenting to the grant by the Secretary. Thus, the grant of easement for right-of-way divested the Tribes of any and all rights, duties or control over North Dakota State Highway No. 8, except those narrow interests specifically reserved.

In deciding whether an accident which occurred on a U.S. highway within the boundaries of an Indian reservation supported tribal court jurisdiction, the district court in *Swift Transp., Inc. v. John*, 546 F. Supp. 1185 (D. Ariz. 1982), *vacated on mootness grounds*, 574 F. Supp. 710 (D. Ariz. 1983), examined the 1948 Rights-of-Way Act, the same statutory scheme under which the right-of-way here was granted. The *Swift* court noted that "[i]t is well established that Indian title is 'only a right of occupancy . . . extinguishable only by the United States.' " *Swift*, 546 F. Supp. at 1192 (citations omitted). After noting that an intent to extinguish Indian property rights is not lightly imputed to Congress and requires a clear expression of congressional intent, the court in *Swift* held that there was "just such a clear expression of congressional

intent to extinguish Indian title in rights-of-way such as U.S. Highway 89." *Id.*

> In 1948 Congress enacted the Indian Rights-of-Way Act, 25 U.S.C. §§ 323-28, which empowers the Secretary of the Interior to grant rights-of-way for all purposes over Indian lands. The right-of-way for U.S. Highway 89 was established pursuant to this statute. Before granting a right-of-way the Secretary must obtain the consent of the landowner under most circumstances. 25 U.S.C. § 324; 25 C.F.R. § 161.3. Plaintiffs assert without contradiction that consent was obtained in this case. Moreover, § 325 and 25 C.F.R. § 161.12 prohibit the grant of rights-of-way without the payment of just compensation. These compensation and consent provisions plainly indicate that Congress envisioned that Indian interest in the land affected would be extinguished. *It is axiomatic that designating these lands as a U.S. Highway open to the general public is wholly inconsistent with an intent to allow the continued right of Indian occupancy.* Accordingly, the Court concludes that the status of U.S. Highway 89 is equivalent to that of the non-Indian fee land in *Montana*.

Id. (citations omitted).

In the present case, all statutory requirements were met in granting the easement to the State of North Dakota, including just compensation pursuant to the 1948 Act, 25 U.S.C. § 325. As in *Swift*, the compensation and consent provisions "plainly indicate that Congress envisioned that Indian interest in the land affected would be extinguished." *See also Wilson v. Marchington*, 934 F. Supp.

1176 (D. Mont. 1995) ("it is beyond dispute that designating a right-of-way as a U.S. Highway with the concomitant unrestricted access to the general public, abrogated any preexisting right to regulatory control" by the Indian tribe.)[23]

The only specific rights reserved to the Tribes and its members involved the right to construct crossings of the right-of-way at all points reasonably necessary. (See Grant of Easement for Right-of-Way "The right is reserved to the Indian landowners, their lessees, successors and assigns to construct crossings of the right-of-way at all points reasonably necessary to the undisturbed use and occupany[sic] of the premises affected by the right-of-way. . . . ") (Addendum A).

Tribal jurisdictional powers over reservation lands "must be read in light of the subsequent alienation of

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[23] The district court, in *Marchington*, after undertaking a detailed analysis of why civil jurisdiction should not rest with the tribe, ultimately concluded that the court "constrained by the doctrine of *stare decisis*, is bound to follow the holding of *Hinshaw* [*v. Mahler*, 42 F.3d 1178 (9th Cir. 1994)] despite the court's misgivings regarding the reasoning employed therein and the result dictated in the present action." Recently, the Ninth Circuit, in *Yellowstone County v. Pease*, 96 F.3d 1169 (9th Cir. 1996) rejected Pease's contention that *A-1 Contractors* was erroneous and in conflict with the *Hinshaw* decision. Instead, the *Pease* decision clarified that *Hinshaw* was consistent with the *Montana* decision and applied the *Montana* analytical framework. The *Pease* court also noted that the *Hinshaw* case is distinguishable in that "the tribal court plaintiff in *Hinshaw*, unlike the tribal court plaintiff in *A-1 Contractors*, was a tribal member residing on the reservation." *See Pease*, 96 F.3d at 1176 n.7 (9th Cir. 1996). In *Pease*, the Ninth Circuit rejected the assertion that the tribal court had jurisdiction.

those lands." *Montana*, 450 U.S. 561; *Bourland*, 508 U.S. at 697. In *Bourland*, the Court considered whether the Cheyenne River Sioux Tribe could regulate hunting and fishing by non-Indians on lands and overlying waters located within the tribe's reservation but acquired by the United States for operation of the Oahe Dam and Reservoir. The Cheyenne River Act reserved to the Tribe the use of the former reservation lands for minerals, grazing and access rights, and for hunting and fishing. The *Bourland* Court recognized that the taking from the Cheyenne River Sioux Reservation differed "from the conveyances of fee title in *Montana* . . . in that the terms of the Cheyenne River Act preserve certain limited land-use rights belonging to the Tribe." 508 U.S. at 692-93.

The Court then concluded that:

> *regardless of whether land is conveyed pursuant to an Act of Congress for homesteading or for flood control purposes, when Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control.* Although *Montana* involved lands conveyed in fee to non-Indians within the Crow Reservation, *Montana's* framework for examining the "effect of the land alienation" is applicable to the federal takings in this case.

Bourland, 508 U.S. at 692 (footnote omitted) (emphasis added).[24]

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[24] *See, e.g., State of Idaho v. Oregon Short Line R.R.*, 617 F. Supp. 207, 210 (D. Idaho 1985), wherein the court observed, in connection with railroads right-of-way acts passed by Congress after 1871, that "Congress, however, still intended railroads to have exclusive use and possession of railroad rights-of-way."

In this case, the easement the United States granted to the State of North Dakota for Highway 8, pursuant to the Indian Rights-Of-Way Act, completely opens up Highway 8 to the use and occupancy of all. Indeed, this 6.59 mile stretch of road is utilized to access the shores of Lake Sakakawea, a federally created water resource project. Anyone who seeks to enjoy the recreational activities and facilities located on Lake Sakakawea, which was created and is maintained by the Army Corps of Engineers pursuant to the Flood Control Act of 1944, may utilize this road. Since "Congress has broadly opened up such land to non-Indians, the effect of the transfer is the destruction of pre-existing Indian rights to regulatory control." *Bourland*, 508 U.S. at 692.[25]

See also State of Wyoming v. Udall, 379 F.2d 635, 640 (10th Cir.), *cert. denied*, 389 U.S. 985 (1967), wherein the court stated that "with the expansion of the meaning of 'easement' to include, so far as railroad are concerned, a right in perpetuity to exclusive use and possession, the need for the 'limited fee' label disappeared."

[25] Petitioners' reliance on *Burlington Northern R.R. Co. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), is not persuasive. Petitioners' Br. 21-22. The right-of-way there was acquired by the railroad's predecessor-in-interest from the United States through statute and presidential directive, with the tribes agreeing that the Secretary of the Interior, not themselves, would establish "such rules, regulations, limitations, and restrictions" as necessary and the "compensation" for the land taken. Act of May 1, 1888, art. VIII, 25 Stat. 113, 115-16. Under these circumstances, the Ninth Circuit's discussion concerning whether the rights-of-way "extinguish[ed] the Tribes' title" (924 F.2d at 902 n.5) added little, if anything, to the required substantive analysis since, whatever the precise nature of the tribal property interest, it was insufficient to preserve a claim to inherent regulatory jurisdiction over property whose control for

II. THE TRIBAL COURT DOES NOT HAVE JURISDICTION UNDER EITHER OF THE *MONTANA* EXCEPTIONS.

A. A-1 and Stockert have no consensual relationships relevant to this action which could support jurisdiction.

The first exception to the general principle outlined in *Montana* requires "consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements" in order to allow tribal jurisdiction over non-Indians. *Montana*, 450 U.S. at 565. The first *Montana* exception does not apply in this case for two reasons: A-1's subcontract with a tribal corporation is not material to this case, and, even if it were, it reflects that disputes will be resolved in a non-tribal forum.

This personal injury action was brought by a non-Indian, Ms. Fredericks, not the Three Affiliated Tribes.[26]

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right-of-way purposes has been retained by the federal government. *Cf. Thomas v. Gay*, 169 U.S. 264, 273 (1898) (indicating by analogy that Arizona and Idaho tribes' interest in railroad rights-of-way was too insubstantial to affect territories' taxation authority). Even less cause exists here to conclude that an underlying interest in the highway right-of-way serves as a basis for the Three Affiliated Tribes' exercise of inherent authority over nonmembers' conduct, since the State of North Dakota clearly possesses *governmental* responsibility for the highway's use and since, in light of this state authority, any suggestion that Congress intended the tribes to have control over access to the public highway is farfetched.

[26] Fredericks' five adult sons, who are allegedly part Indian and tribal members, do not confer jurisdiction. Their

Therefore, the inquiry regarding consensual relationship concerns whether Lyle Stockert or A-1 Contractors entered into consensual relationships with any of the Fredericks who are also members of the Tribe. Ms. Fredericks is not a member of the Tribe. Although her sons allegedly are members of the Three Affiliated Tribes, Stockert and A-1 have not entered into any consensual relationships with Ms. Fredericks *or* her sons. The Tribe is not a party, and any consensual relationship with the Tribe is not the subject of this case.

The petitioners and the United States argue that the consensual relationship test is satisfied in this case because A-1 entered into a landscaping subcontract with LCM, allegedly a subsidiary of the Tribe, to perform landscaping work on a tribal community building. Even if there were a nexus between the subcontract agreement and this case, it cannot be considered to supply A-1's consent to jurisdiction of a tribal court. The LCM contract provides for adjudication of disputes between A-1 and LCM under Utah law in Utah courts.[27] (J.A. at 111 n.5). Petitioners further overlook that Stockert had an unqualified right to use the state highway regardless of A-1's dealings with LCM. Finally, petitioners' contention that

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consortium claims are not recognized causes of action and are derivative rather than independent causes of action. The question was not addressed by the tribal trial court or any of the subsequent reviewing courts.

[27] The contract was before the trial court, attached to plaintiffs' Fredericks' brief in opposition to motion to dismiss in tribal court. (J.A. at 111 n.5.) The question as to why the choice of law provisions were included in the contract was not addressed by any courts below.

Stockert was on the reservation in furtherance of that subcontract with LCM when the accident occurred has no record support.

The Court of Appeals properly rejected petitioners' argument that a consensual relationship supports tribal jurisdiction in this case. The *en banc* decision reasons that this is a simple personal injury lawsuit initiated by a non-Indian against another non-Indian arising out of a vehicular accident which happened to occur on a state highway within the geographical confines of the reservation. The personal injury action was brought by Ms. Fredericks, a non-Indian, not the Three Affiliated Tribes. The Tribes were not a party to the personal injury action, and any consensual relationship between the respondents and the Tribes bears no relationship to the subject of this case. As such, the *Montana* consensual relationship test is not satisfied.

Put plainly, the accident, rather than any contract with the Tribes, is the subject of the Fredericks' action. The dispute in this case arises from a simple automobile accident between two non-Indians and does not arise under the terms of, out of, or within the ambit of the "consensual relationship" with a tribal corporation. To suggest, as the petitioners do, that this meets the *Montana* "consensual relationship" test is unsupported, unwarranted, and would lead to an unfair result. If tribes can obtain unlimited nonconsensual civil jurisdiction relating to any matter or dispute, over a party who entered into a single commercial relationship with a tribe or its related entitles, where the pertinent contract expressly foreclosed tribal court jurisdiction if a dispute arose, knowledgeable companies and persons may be far less interested in

entering into commercial arrangements with tribes. This Court should affirm the Court of Appeals' conclusion that the tribal court does not have subject matter jurisdiction under *Montana's* first exception.

B. This tort action has no direct effect on the political integrity, economic security, or the health or welfare of the tribe.

The second exception to the general principle outlined in *Montana* requires conduct that "threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Montana*, 450 U.S. at 466. Under this exception regulation of some activities of non-Indians or nonmembers on the reservation *may* be within the tribe's power. *Montana*, 450 U.S. at 565.

The Court has severely limited the power of tribes to regulate the activities of non-Indians. Justice White's opinion in *Brendale* found it "significant that the second *Montana* exception is prefaced by the word 'may'." 492 U.S. at 428-29. Use of the word "may" reflects "that a tribe's authority need not extend to all conduct that 'threatens or has some direct affect on the political integrity, economic security, or the health or welfare of the tribe,' but instead depends upon the circumstances." *Id.* at 429. Consequently to determine whether an "effect" meets the *Montana* threshold, a court must decide whether, and to what extent, the tribe has a "protectable interest" in the activities giving rise to such an effect, and

if it has such an interest, how it may be protected. *Brendale*, 492 U.S. at 430. The concept of a "protectable interest" grew out of a long line of cases exploring the very narrow powers reserved to tribes over the conduct of non-Indians within their reservations. *See County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 266-67 (1992). A protectable interest, if it exists, however, does not entitle a tribe to assert civil jurisdiction in every situation that has some adverse affect on the tribe. *Brendale*, 492 U.S. at 431. A protectable interest is "defined in terms of the impact of the challenged uses on the political integrity, economic security, or health or welfare of the tribe." *Id.* at 430-31. "The impact must be demonstrably serious and must imperil the political integrity, the economic security, or the health and welfare of the tribe." *Id.*

An alleged tort between non-Indians that occurred on a state highway running through the reservation does not threaten or have a direct effect on the political integrity, the economic security or the health and welfare of the tribe. In this case, the petitioners argue that the Tribes' interests in asserting their sovereign authority over events that occurred within the geographical boundaries of the reservation is, in and of itself, sufficient to meet the direct effect test outlined in Montana. However, such a broad ruling would completely ignore the dictates of this Court's prior decisions and would allow the exception to swallow up the rule.

As the *en banc* decision notes "this desire to assert and protect excessively claimed sovereignty is not a satisfactory tribal interest within the meaning of the second *Montana* exception." (J.A. at 112). Any other result would

render meaningless this Court's previous rulings, including *Montana*, *Duro*, and *Bourland*. As noted in the Court of Appeals' decision, this case "is not about a consensual relationship with a tribe or the tribe's ability to govern itself; it is all about the tribe's claimed power to govern non-Indians and nonmembers of the tribe just because they enter the tribe's territory." (J.A. at 114).

Neither a consensual relationship nor matters directly affecting tribal self-government or internal relations under the *Montana* test are present in the Fredericks' action against Stockert. There was no consensual relationship between the Fredericks and Stockert. The Three Affiliated Tribe's economic security and general welfare would not suffer as a result if Ms. Fredericks must sue Lyle Stockert in a state court. The two limited circumstances in which Indian tribes may exercise civil jurisdiction over nonmembers are not present in this action. Therefore, the Tribal Court does not have subject matter jurisdiction over this action.

CONCLUSION

Respondents A-1 Contractors and Mr. Lyle Stockert respectfully request that the judgment of the Court of Appeals be affirmed and the case be remanded to the District Court for an order granting the injunctive and declaratory relief requested by Stockert and A-1.

Respectfully submitted,

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APPENDIX

301 10778

TRIBAL: 0.00
INDIVIDUALLY OWNED: 87.48
GOVERNMENT OWNED: 0.00
FILE NO: S-345(10) & FLH 345(12) N. Dak.

GRANT OF EASEMENT FOR RIGHT-OF-WAY

KNOW ALL MEN BY THESE PRESENTS:

That the United States of America, acting by and through the Superintendent of the Fort Berthold Agency, Bureau of Indian Affairs, Department of the Interior, New Town, North Dakota, hereinafter referred to as "Grantor", under authority contained in Order No. 2508 of the Secretary of the Interior (14 F. R. 258) and 10 BIAM 3 (34 F. R. 637) and pursuant to the provisions of the Act of February 5, 1948 (62 Stat. 17, 25 U.S.C. 323-328), and Part 161, Title 25, Code of Federal Regulations, in consideration of $5,546.50 (Five Thousand Five Hundred Forty Six and 50/100 Dollars) and other good and valuable consideration, the receipt of which is acknowledged, does hereby grant to NORTH DAKOTA STATE HIGHWAY DEPARTMENT, BISMARCK, NORTH DAKOTA, hereinafter referred to as "Grantee", an easement for a right-of-way for the realignment and improvement of North Dakota State Highway No. 8 over, across and upon the following described lands located in the County of Dunn, in the state of North Dakota; to wit:

Township 147 North, Range 91 West, Fifth P. M., N. Dak.

Sec. 23	W1/2SW1/4	Al. 393
Sec. 23	E1/2SW1/4, SE1/4	692-A
Sec. 24	NW1/4NE1/4, NE1/4NW1/4	1100-A
Sec. 24	S1/2N1/2, SW1/4	846-A
Sec. 26	W1/2NW1/4	509-A
Sec. 27	NE1/4, SW1/4	514-A
Sec. 27	N1/2SE1/4, SW1/4SE1/4	387
Sec. 33	NE1/4	777-A
Sec. 33	S1/2	761-A
Sec. 34	NE1/4NW1/4	457
Sec. 34	NW1/4NW1/4	1593

Township 146 North, Range 91 West, Fifth P. M., N. Dak.

Sec. 4	Lots 3 & 4, S1/2NW1/4	758-A
Sec. 5	S1/2NE1/4	1964
Sec. 5	SE1/4	1102-A
Sec. 8	NE1/4	1102-A
Sec. 8	SE1/4	1917
Sec. 9	N1/2SW1/4	1917
Sec. 17	NE1/4NE1/4	1917

The said easement, as shown on the map and plats attached hereto and made a part hereof, does not include any non-trust property, but applies to trust lands only and may be described in general as: Commencing at a point 1,069.4 feet North and 523.9 feet East of the Southwest corner of the Southeast Quarter of Sec. 12, T. 147 N., R. 91 W., 5th P. M., North Dakota, thence south on the centerline of State Highway No. 8 a distance of 1.73 miles (9,152.7 feet) to the POINT OF BEGINNING (Sta. 91 + 36.7 of survey), thence southwesterly on said centerline a

distance of 6.44 miles to the Section line common to Sections 9 and 16, T. 146 N., R. 91 W., 5th P. M. North Dakota, thence west on said Section line a distance of 58.9 feet to the Section corner common to Sections 8, 9, 16 and 17, thence south on the Section line common to Section 16 and 17 a distance of 780.9 feet, to the POINT OF TERMINATION. The said length being approximately 6.59 miles, and of variable widths as more particularly delineated on the attached map and plats.

This easement is subject to any valid existing right or adverse claim and is without limitation as to tenure, so long as said easement shall be actually used for the purpose above specified; PROVIDED, that this right-of-way shall be terminable in whole or in part by the Grantor for any of the following causes upon 30 days' written notice and failure by the Grantee within said notice period to correct the basis for termination (25 CFR 161.20):

A. Failure to comply with any term or condition of the grant or applicable regulations.

B. A nonuse of the right-of-way for a consecutive two-year period for the purpose for which it was granted.

C. An abandonment of the right-of-way.

D. Failure of the Grantee, upon the completion of construction, to file with the Grantor an Affidavit of Completion pursuant to 25 CFR 161.16.

E. The right is reserved to the Indian land owners, their lessees, successors, and assigns to construct crossings of the right-of-way at all points reasonably necessary to the undisturbed use and occupany [sic] of the premises

affected by the right-of-way; such crossings to be constructed and maintained by the owners or lawful occupants and users of said lands at their own risk and said occupants and users to assume full responsibility for avoiding, or repairing any damage to the right-of-way, which may be occasioned by such crossings.

The conditions of this easement shall extend to and be binding upon and shall inure to the benefit of the heirs, representatives, successors, and assigns of the Grantee.

IN WITNESS WHEREOF, Grantor has executed this grant of easement this 8th day of May, 1970.

UNITED STATES OF AMERICA

BY: /s/ James R. Keaton
James R. Keaton,
Superintendent
U. S. Department of the Interior
Bureau of Indian Affairs
Fort Berthold Agency
New Town, North Dakota

State of North Dakota)
) SS:
County of Mountrail)

BE IT REMEMBERED, That on this 8th day of May, 1970, before the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared James R. Keaton, to me personally known to be the identical person who executed the within instrument of writing, and such person duly acknowledged the execution of the same.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my seal on the day and year last hereinabove written.

/s/ Anna M Morsette
Notary Public

My Commission expires
Jan. 10, 1974